

# The Legal Career of John G. Diefenbaker

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## I. Introduction

John George Diefenbaker, Canada's thirteenth Prime Minister, was a practising lawyer for over thirty-seven years. He was called to the bar in June 1919 and retired when he became leader of the Progressive Conservative Party in December 1956. Most of the writing about him has understandably centred on his political career; however, Diefenbaker was elected to public office (on his sixth attempt) in 1940 at the age of forty-four. Prior to that, he had earned his living exclusively as a barrister and solicitor in small-town Saskatchewan, and his experiences there shaped both his political outlook and his work methods.

It is interesting that, throughout Diefenbaker's political life, his contemporaries repeatedly referred to the way in which his legal career had shaped his character. For example, one of his colleagues noted that during Cabinet meetings:

[i]f there wasn't a consensus and he didn't think the person holding out was a fool, to the exasperation of those of us who knew we were on the right course and wanted to get on with it, he'd roll it over, bring it up another time, try to bring him around, almost like a lawyer trying to bring a jury around so you've got all the twelve heads nodding.<sup>1</sup>

Another said:

One of the things that stands out in my mind about John Diefenbaker is that, while he had great concepts, he was not strong on an actual program by which they would be implemented. Perhaps this was the result of his training as a defence counsel. It was not his responsibility to build a positive case, it was his responsibility to destroy the Crown's case. I think maybe that this training, this whole background and attitude, made it difficult for [him] to sit down and plan out step by step the positive program.<sup>2</sup>

Even his political opponents made legal analogies:

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<sup>1</sup> Roy Fabish quoted in P. Stursberg, ed., *Diefenbaker: Leadership Gained, 1956-62* (Toronto: University of Toronto Press, 1975) at 177-78.

<sup>2</sup> Davie Fulton, *ibid.* at 178.

Mr Diefenbaker is one of those people who is a merchant of words and when he says something he thinks he has done something. Now, I attribute this to his long period in opposition, to the fact that he was a courtroom lawyer where when you say something and it is effective you have done something. I also attribute it to another thing: that he was a loner. He never learned how to work cooperatively.<sup>3</sup>

The purpose of this paper is to examine the information about Diefenbaker's legal career that is scattered throughout the primary and secondary sources. The most noteworthy thing that results from this examination is that, his reputation to the contrary, only about five percent of his cases dealt with criminal law. His political career has been discussed fully elsewhere<sup>4</sup> and most of it is beyond the scope of this article.

## II. Legal Education

When Saskatchewan was established in 1905 no law school existed in the province. Students with Bachelor of Arts degrees articulated in a solicitor's office for three years; those who had graduated from high school articulated for five years. While articling, students wrote three annual exams set by the Law Society and, if successful, were admitted to the bar. From 1907 in Regina and 1910 in Saskatoon, informal lectures were given by practitioners to help students prepare for the examinations.

The College of Law was established as the fourth college of the University of Saskatchewan in 1913. In the same year a second law school, Wetmore Hall (named in honour of the first Chief Justice of Saskatchewan, Edward Ludlow Wetmore), began accepting students in Regina. It offered a three-year course but, unlike the U of S, it did not grant degrees in law; it closed in 1922. During its first decade, the College of Law conducted classes in downtown Saskatoon in the McKay Block, the Canada Building, the Masonic Temple, the Willoughby Sumner Building, and the National Trust Building. It was not until the closing of Wetmore Hall that classes were moved to the Administration Building on the campus.<sup>5</sup>

Diefenbaker received his B.A. in May 1915 and his M.A. a year later. During his second undergraduate year he took two law classes (jurisprudence and contracts) and studied constitutional law as part of his graduate work. In 1914, he was admitted to the law programme and took municipal, company, and sales law, and received credit for some of his political science classes. He was commissioned as a lieutenant in the Canadian army on May 27, 1916. He first entered into articles with Russell Hartney of Saskatoon on June 12, 1916 at a salary of \$15 a

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<sup>3</sup> J.W. Pickersgill, *ibid.* at 224-25.

<sup>4</sup> Diefenbaker's political career has been the subject of a number of books beginning with P.C. Newman, *Renegade in Power: The Diefenbaker Years* (Toronto: McClelland and Stewart, 1963).

<sup>5</sup> W.H. McConnell, *Prairie Justice* (Calgary: Burroughs, 1980) at 103-05.

month; he resigned on August 22, 1916, and had been called up for active service by the end of the month.

Following his time in the army and convalescence (August 25, 1916 to April 1, 1918) he returned to work with Hartney, but his articles were assigned to Frederick Finlay MacDermid (of Ferguson & MacDermid) on June 18, 1918.<sup>6</sup> Diefenbaker stayed with MacDermid for only about three months. As MacDermid later explained: “We didn’t get along too well. Any student I had, I wanted him in the office looking after business but he was always running around, into politics. So we soon parted ways.”<sup>7</sup>

Diefenbaker re-enrolled in the College of Law in September 1918. The law classes he had taken during his undergraduate arts degree gave him credit for nearly one year of the three-year law course and the university credited him with an additional year for his time spent overseas (October 1916 to February 1917). Unfortunately, the flu epidemic of 1918 kept the university closed until late December. In the meantime, he continued his articles with Thomas Andrew Lynd (of Lynd & Yule) to whom they were assigned by MacDermid on September 17, 1918.<sup>8</sup> His fellow student at this firm was Emmett Hall and the paths of these two men would continue to cross throughout their careers.

Diefenbaker’s favourite teachers were Arthur Moxon, Donald Maclean, and Ira Allen MacKay, all of whom had come to the University of Saskatchewan from Nova Scotia. He was particularly impressed with MacKay, of whom he wrote:

No one had a greater influence on me in university than he. He was my professor in political science and law, and he had that quality essential to a great teacher, the power to inspire. He was a man of much wisdom and I remember many of his lessons. He judged that a people can never be made good by legislation, a point that many of us never learn.<sup>9</sup>

Of Dean Arthur Moxon, Diefenbaker said:

[H]e could have touched the heights in law. He had a great heart, and his knowledge and appreciation of jurisprudence brought that subject to life for us. No student I know who was privileged to

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<sup>6</sup> Diefenbaker Canada Centre Archives, John G. Diefenbaker Fonds, *Legal Papers* (hereinafter *LP*), vol. 23, file 671 at 21270-74.

<sup>7</sup> D. Smith, *Rogue Tory: The Life and Legend of John G. Diefenbaker* (Toronto: Macfarlane Walter & Ross, 1995) at 31-32.

<sup>8</sup> *LP*, vol. 23, file 671 at 21282-86.

<sup>9</sup> J.G. Diefenbaker, *One Canada: The Memoirs of the Right Honourable John G. Diefenbaker*, vol. 1 (Toronto: Macmillan, 1975) at 79.

have had him as professor but would agree with me that no one was his equal as a teacher.<sup>10</sup>

Moxon was created a King's Counsel in 1927 and retired as Dean of Law to enter private practice in 1929 with the Saskatoon firm of Estey, Moxon, Schmitt & McDonald. He taught at the College on a part-time basis until 1938. Moxon "used to contend that to be appointed a judge one had to be elected three times or defeated twice".<sup>11</sup>

By May 1919, Diefenbaker had completed the nine classes required for the law degree. He also benefitted from an agreement dated March 20, 1919 which provided that:

the students of Wetmore Hall having passed their first and second intermediate exams (i.e., all but the final-year exam) would be exempted from the first two years of law studies and could receive an LL.B. degree after one further year of university law studies. Correspondingly, university law students would be exempted from the first two professional exams, being required to successfully complete only the final Law Society exam at the end of their articles.<sup>12</sup>

Immediately after graduation he wrote his final bar exam and was relieved of the requirement to spend any more time under articles.

Even at a time when legal education was just becoming formalized, Diefenbaker seems to have received an unusually small amount of legal training. His studies comprised some legal courses taken as an undergraduate and graduate student, less than five months at law school, and about eleven months of sporadic articling. Nonetheless, despite this somewhat shaky background, he ranked seventh of the thirty-nine candidates who wrote the final exam.<sup>13</sup>

Diefenbaker signed the roll of the Law Society in Regina on June 30, 1919 and later recalled:

As a young boy, I had set my mind on becoming a lawyer. My ambition was now realized. What my boyish determination had not included was an understanding that a call to the bar was a beginning, not an end, and that indeed there was no end to the law. Canadian law, like English law, is a living thing, subject to constant change. That combination of tradition, statute, and

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<sup>10</sup> *Ibid.* at 80.

<sup>11</sup> McConnell, *supra* note 5 at 88.

<sup>12</sup> *Ibid.* at 105.

<sup>13</sup> G. Wilson and K. Wilson, *Diefenbaker for the Defence* (Toronto: J. Lorimer, 1988) at 26.

judicial decision constituting the law provides at any one time the most exact and complete expression of what we are as a society...[However] a call to the bar assures only that one has read and learned enough law to begin in earnest the process of learning the law.<sup>14</sup>

His first court appearance began inauspiciously: during a chambers *ex parte* application before District Court Judge E.A.C. McLorg, Diefenbaker somehow managed to get his foot caught in a wire wastepaper basket.<sup>15</sup> But, from the outset, he seemed able to appreciate the humorous aspects of legal life:

There are many amusing stories about the J.P. courts. One concerns a Justice of the Peace who had brought before him information that Mr. X had removed from a slough a small boat--a punt--that did not belong to him. The J.P. had his copy of the criminal code. He went through it and concluded that the offence committed by the alleged wrongdoer was not theft. Theft was defined among other things as taking from the possession of him who has. He decided that since the punt was on the slough it could not have been in possession of its owner. He finally came on to what he regarded as an appropriate charge: piracy on the high seas. It was only after Mr. X was convicted that the Justice of the Peace discovered that the penalty for piracy was death!<sup>16</sup>

Of course Diefenbaker's reminiscences have to be taken with a grain of salt. Many of them have a distinct after-dinner-speech tone. For example, on another occasion he was quoted as saying:

Justices of the peace did their part. I think of one that I appeared before. He came from continental Europe. One of the first qualifications to be a J.P. was to be a Liberal. To disqualify oneself from such an appointment was to be other than a Liberal. The charge against my client...was that he did insult the complainant.... I said, "What is this anyhow?" He said, "You know what hits is, that's assault. You know what bad words is, that's insult. This was both."<sup>17</sup>

### III. Wakaw

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<sup>14</sup> Diefenbaker, *supra* note 9 at 93, 95.

<sup>15</sup> *Ibid.* at 92.

<sup>16</sup> *Ibid.* at 94.

<sup>17</sup> J.A. Munro, ed., *The Wit and Wisdom of John Diefenbaker* (Edmonton: Hurtig, 1982) at 68.

Diefenbaker wanted to practise on his own and, after consultation with Saskatoon lawyer David Kyle, decided on Wakaw (population 600) which was about equidistant from Prince Albert, Saskatoon, and Humboldt. Much later in life he was quoted as saying:

In determining where in Saskatchewan to set up practice, I took account of criminal and civil court cases in each area, and two places, above others, seemed to commend themselves: Theodore, a village near Yorkton, and Wakaw. I decided on the village of Wakaw. It was in that part of the province which I knew best and it was alleged that there were more murders in Wakaw than drunks in Saskatoon.<sup>18</sup>

He must have been making plans prior to his admission to the bar because the next day (July 1, 1919) he opened his law office. The original building is long since gone, but a replica was erected in 1971 by the local Lions Club.

Diefenbaker had many professional dealings with Wakaw Justice of the Peace J.H. Lewis and Prince Albert District Court Judge Algernon Edwin Doak. His only legal competition in the town (until 1923) was Arthur E. Stewart. His first client was his brother Elmer who came up from Saskatoon for a vacation. Diefenbaker recalled:

He sought my advice on a particular matter and, expressing the belief that those who practise law should be paid in cash, he gave me one dollar, which in his words, was worth more than any advice I could give.<sup>19</sup>

Diefenbaker had not been in Wakaw long when a furore arose at the University of Saskatchewan over the firing of four professors by President Walter C. Murray for allegedly trying to undermine his authority.<sup>20</sup> One of the professors involved was Dr. Ira Allen MacKay who had taught Diefenbaker political science and law. Diefenbaker returned from Wakaw to help lead the unsuccessful attempt in Convocation to have the four professors reinstated. MacKay went on to become Dean of Arts at McGill University in 1924.

The first big case to come Diefenbaker's way was *R. v. Chernyski*<sup>21</sup> in which he defended an accused charged with criminal negligence for shooting a neighbourhood boy at

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<sup>18</sup> *Ibid.* at 71.

<sup>19</sup> *Ibid.* at 98.

<sup>20</sup> See, *inter alia*: D. Kerr and S. Hanson, *Saskatoon: The First Half-Century* (Edmonton: NeWest, 1982) at 218-29; W.P. Thompson, "A University in Trouble" (1964), 17 *Saskatchewan History* 81-104; *Re The University of Saskatchewan and MacLaurin*, [1920] 2 W.W.R. 823 (Sask. K.B.).

<sup>21</sup> The case is unreported. For fuller discussions see Diefenbaker, *supra* note 9 at 98-100, Smith, *supra* note 7 at 35-37, and Wilson & Wilson, *supra* note 13 at 1-9.

twilight in the mistaken belief that the child was an animal.<sup>22</sup> The trial began at Humboldt on October 23, 1919 and was presided over by the Chief Justice of the Court of King's Bench, James Thomas Brown. Emmett Hall was serving his articles in Humboldt at the time and, because of his knowledge of the local populace, helped Diefenbaker with jury selection. As Prime Minister, Diefenbaker appointed Hall to succeed Brown as Chief Justice of Queen's Bench (1957), and later elevated him to Chief Justice of Saskatchewan (February 1961) and to the Supreme Court of Canada (November 1962). Hall, through conversations with the judge over dinner, also helped Diefenbaker to shape the presentation of his case, a practice which would not be viewed favourably in more recent times.<sup>23</sup> In any event, Diefenbaker won an acquittal and pocketed a substantial fee of \$600. To indicate just how large a sum this was in 1919, it could be noted that the entire cost of materials to build Diefenbaker's law office in Wakaw was \$480.08.<sup>24</sup>

The life of litigators in a small Saskatchewan town at this period has been carefully described elsewhere:

The court work that came to Wakaw's two lawyers, John Diefenbaker and Arthur E. Stewart, was handled at three levels: police court, as it was then very aptly called; District Court; and, for the more substantial civil and criminal cases, the Court of King's Bench, usually sitting with a jury. Police court---presided over by the local justice of the peace, an itinerant magistrate or two J.P.s sitting together---was the court of first instance in all criminal matters, and provided...the final disposition in the great majority of cases. Appeals were heard by the District Court, usually by way of new trial. Serious criminal cases went to a King's Bench jury after a preliminary inquiry.

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<sup>22</sup> Diefenbaker incorrectly states that the charge was attempted murder (Diefenbaker, *supra* note 9 at 98). See Smith, *supra* note 7 at 36.

<sup>23</sup> Hall sent the following note to Diefenbaker written on a copy of the first page of the indictment in the case (*LP*, vol. 7, file 136 at 6750):

we were sitting & talking with the judge & he, in commenting on the case said that the only weakness displayed in your case so far was that you had laid to [sic] much stress upon the darkness, I would comment upon it, but dont [sic] paint in [sic] too black, he is somewhat suspicious of your evidence as to the darkness -- He is very favorable -- he doesnt [sic] believe that the injured man is telling the truth about his actions -- follows Dave's [?] line of argument re his position on the ground.  
He is very suspicious of the injured man on account of the discrepancies between his testimony here & at Wakaw --- Referring to the darkness the Judge is quite impressed with this fact: The light was lit inside & when accused rushed out the darkness would appear greater.

<sup>24</sup> Smith, *supra* note 7 at 35.

With their civil work, the lawyers were almost exclusively before the District Court judge, who handled not only his court's jurisdiction but a great deal of the King's Bench files as well. District Court sat twice a year at Wakaw, setting up a formal court in the town hall. In between sittings, and for the King's Bench sittings, the Wakaw lawyers had to travel the forty miles north to Prince Albert.<sup>25</sup>

Initially Diefenbaker made quite a good living from his law practice. He had an annual net income of \$3600 in 1920 and \$2400 in 1921;<sup>26</sup> however, the economic climate cooled in the early 1920s and he was often paid in wheat for his professional services. He supplemented his income by acting as a collection agent, arranging mortgage loans, and selling insurance.<sup>27</sup> He hired his former classmate Michael Stechishin (who, in 1940, became a District Court Judge in Wynyard) as an articling student. Stechishin moved to Yorkton in 1921 following his call to the bar but, in the meantime, his fluency in Ukrainian was of great help in dealing with many of Diefenbaker's clients who originally came from Ukraine.

An interesting case from around this period was *Boutin v. Mackie*<sup>28</sup> in which Diefenbaker handled the appeal from a summary conviction of two school trustees charged with knowingly permitting French to be used as the general language of instruction in their school. He won the appeal on a very narrow legal argument and in spite of the fact that the judge (Algernon Edwin Doak) very obviously would have liked to convict the appellants. The judgment, in effect, permitted the continued *de facto* use of French and this was one of the cases that laid the foundation for Diefenbaker's reputation as a defender of minority rights. This was his first reported case.

Diefenbaker was unwell during 1922 and 1923<sup>29</sup> and was admitted to hospital in November.<sup>30</sup> The illness was apparently affecting his work to a certain extent during this period. In one of the cases in which he was involved, he failed to pay sufficient attention to a Montreal lawyer's instructions and months passed during which he repeatedly failed to supply requested documents.<sup>31</sup> In July 1923, he hired Alexander A. Ehman to assist him; Ehman continued to run the office in Wakaw after Diefenbaker moved to Prince Albert.

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<sup>25</sup> Wilson & Wilson, *supra* note 13 at 36.

<sup>26</sup> *Ibid.* at 37.

<sup>27</sup> See *LP*, vols. 12-14 and vol. 1, file 3.

<sup>28</sup> *Boutin v. Mackie*, [1922] 2 W.W.R. 1197 (Sask. Dist. Ct.).

<sup>29</sup> Letter to Makaroff & Bates, Barristers & Solicitors, Saskatoon (22 April 1922), *LP*, vol. 2, file 61 at 2040.

<sup>30</sup> Letter from A. Ehman to Western Trust Co., Winnipeg (19 November 1923), *LP*, vol. 23, file 691 at 15412.

<sup>31</sup> *Brochu v. Rivard* (1923), *LP*, vol. 1, file 20.



As his most recent biographer observed:

Although the volume of his civil work was increasing, his growing reputation was based on his talents in criminal defence. He found the role congenial and honed his skills in the courtroom with every case. On stage for the defence, he discovered his special dramatic genius. By the use of his voice, his penetrating eyes, his raised arm and accusatory finger, his sense of the ridiculous, his edge of sarcasm, his command of the fine points of law and evidence, he became a master of his juries.<sup>32</sup>

In early 1924, Diefenbaker made his first appearance before the Saskatchewan Court of Appeal in Regina. The matter involved the digging of a well and the sum of \$125. While this was not a particularly auspicious case with which to begin his appellate career Diefenbaker was, at least, successful.<sup>33</sup> A few months later, he also convinced the Court of Appeal to order a new trial owing to a judge's faulty charge to a jury.<sup>34</sup>

#### IV. Prince Albert

Diefenbaker moved to Prince Albert in the summer of 1924 and set up his office in a bank building on Central Avenue. He lived in the Avenue Hotel and later shared rooms in a private home with his brother Elmer. He did not purchase his first house until after his marriage to Edna Mae Brower in 1929.

Frank Clifford Cousins joined Diefenbaker as a junior partner in early 1926. Alexander Ehman remained in Wakaw for only about six months after Diefenbaker's departure. He was replaced by Alexis Etienne Phillion, then by Richmond B. Godfrey and the firm name became Diefenbaker, Cousins & Godfrey. Cousins died of a heart attack at the age of thirty-three on June 9, 1927. He was discovered in bed at his boarding house and Coroner R.L. King stated that death was due to natural causes, probably the result of his having been gassed during the war.<sup>35</sup>

During this period Diefenbaker handled several cases which, although apparently rather trivial, found their way into the law reports. They concerned matters such as child custody,<sup>36</sup> agricultural fixtures,<sup>37</sup> whether a new roof constituted an "addition" to a building,<sup>38</sup> a

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<sup>32</sup> Smith, *supra* note 7 at 40.

<sup>33</sup> *Savidan v. Laplante*, [1924] 3 D.L.R. 1089, [1924] 2 W.W.R. 1222 (Sask. C.A.).

<sup>34</sup> *R. v. Swityk*, [1925] 1 D.L.R. 1015, [1925] 1 W.W.R. 656, 43 C.C.C. 245 (Sask. C.A.).

<sup>35</sup> *The [Prince Albert] Daily Herald* (9 June 1927) 1.

<sup>36</sup> *Re Simonson, Simonson v. Slaaten*, [1927] 3 D.L.R. 543 (Sask. K.B.).

<sup>37</sup> *Cherry v. Bredin* (1927), 22 Sask. L.R. 24, [1927] 3 D.L.R. 326, [1927] 2 W.W.R. 314 (C.A.).

controverted election,<sup>39</sup> and the effect on a mechanic's lien of a contract executed on a Sunday in contravention of the *Lord's Day Act*<sup>40</sup>. One of his 1929 cases, however, attracted a good deal of attention. The case was *R. v. Olsen*<sup>41</sup> and it stands for the proposition that a judge may comment on the evidence during the course of a trial so long as the judge makes it manifestly clear to the jury members that they are the sole arbiters of the facts in the case, including the credibility of the witnesses.

At about the same time he also defended John Pasowesty, a seventeen-year-old sentenced on November 21, 1929 at Wynyard for the murder of his father, Nick.<sup>42</sup> Pasowesty's defence was that his mother, Annie, had committed the crime and convinced her son to confess to it. The jury deliberated for seventeen hours before finding him guilty. Diefenbaker sent a long telegram to the Minister of Justice asking for a reprieve because Pasowesty, according to several experts, had the mental development of a twelve-year-old.<sup>43</sup> The death sentence was later commuted to life imprisonment by the Cabinet.<sup>44</sup>

By 1929, the Wakaw branch office was closed and Diefenbaker was again practising alone under the style of Diefenbaker & Co. He then formed the firm of Diefenbaker & Elder with William G. Elder, but the partnership dissolved in the summer of 1932.

The 1930s began with a string of minor cases involving custody,<sup>45</sup> slander,<sup>46</sup> and the *Juvenile Delinquents Act*.<sup>47</sup> But in 1931 Diefenbaker became involved with a rather complicated civil action in which he represented a company that supplied railway ties to the Canadian National Railways.<sup>48</sup> The issues in the litigation involved a resulting trust and the lack of *consensus ad idem* regarding the terms of an agreement between the company and one of its sub-contractors. Diefenbaker's arguments were perfectly sound, but he lost the case. The next year,

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<sup>38</sup> *Danby v. Village of Wakaw and Kraus*, [1927] 3 W.W.R. 107 (Sask. Dist. Ct.).

<sup>39</sup> *R. ex rel. Kwasnica v. Johansick*, [1928] 2 D.L.R. 913, [1928] 2 W.W.R. 315 (Sask. Dist. Ct.), appeal dismissed without reasons, May 2, 1928 (Sask. C.A.).

<sup>40</sup> *Farrell v. Sawitski*, [1929] 4 D.L.R. 289, [1929] 3 W.W.R. 23 (Sask. Dist. Ct.).

<sup>41</sup> *R. v. Olson* (1929), 23 Sask. L.R. 321, [1929] 2 D.L.R. 300, [1929] 1 W.W.R. 431, 51 C.C.C. 122 (C.A.).

<sup>42</sup> *The [Prince Albert] Daily Herald* (22 November 1929) 1.

<sup>43</sup> *LP*, vol. 8, file 162 at 8560-61.

<sup>44</sup> *Ibid.* at 8565.

<sup>45</sup> *Sutcliffe v. Sutcliffe* [1930] 2 D.L.R. 645, [1930] 1 W.W.R. 625 (Sask. K.B.).

<sup>46</sup> *Mercereau v. Hock* (1930), 24 Sask. L.R. 483, [1930] 3 D.L.R. 159, [1930] 1 W.W.R. 821 (Sask. K.B.).

<sup>47</sup> *R. v. Schwanbeck*, [1931] 3 D.L.R. 745, [1931] 3 W.W.R. 59, 56 C.C.C. 94 (Sask. K.B.).

<sup>48</sup> *Marshall v. Hett & Sibbald Ltd.*, [1932] 1 W.W.R. 520 (Sask. C.A.).

when the same parties returned to the Court of Appeal on a related matter, Diefenbaker had been replaced as the company's counsel by A.E. Bence, K.C.<sup>49</sup>

Unlike many people on the prairies, Diefenbaker's financial position during the Depression was remarkably good. In August 1930, he was appointed junior counsel for the Conservatives on the Bryant Charges Commission, a Royal Commission into accusations of political interference by the Liberals in the operations of the provincial police. He received \$6500 for fifty-five days of hearings (\$100 per day plus a \$1000 living allowance). His papers also reveal that he pursued the collection of his legal fees with great persistence in the 1930s. He bought a new Buick sedan for \$1600 in April 1936 and went on a European vacation (France and Germany) in July and August.<sup>50</sup> His net income in 1930 was \$4573; \$4142 in 1933; and \$4500 in 1935.<sup>51</sup> By way of comparison, a prominent Saskatoon lawyer, J. M. Goldenberg, was netting about \$2000 per year during the same period<sup>52</sup> and Judge Walter H. Nelson knew of a lawyer working on a City of Saskatoon road crew for \$3 a day in 1933.<sup>53</sup> Henry C. Rees, Q.C. recalled receiving "an occasional pig in lieu of legal fees, and his friend and one-time associate Philip McMeans at Blaine Lake received a substantial portion of his fees in chickens, turkeys, dill pickles and borscht".<sup>54</sup> As the Depression wore on, Diefenbaker's income dropped slightly but remained at about \$3500 per year between 1936 and 1938.<sup>55</sup>

Diefenbaker still seemed to have the occasional case to which he did not pay sufficient attention. One such case involved a claim to the Irish Grants Committee which was created to compensate people who had suffered injuries or lost property in the Irish Free State. He was retained by a client on December 1, 1926 who asked him to inquire about an application for a grant of reparation. Despite urging from the client, Diefenbaker kept delaying the matter until the Committee had been disbanded. He was still fiddling with the file as late as 1932.<sup>56</sup>

It was during this period that Diefenbaker undertook one of his most controversial defences. The case involved Alex Wysochan who was accused of the murder of his lover, Antena Kropa. Adrien Doiron of Vonda appeared for the accused at the preliminary hearing

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<sup>49</sup> *Marshall v. Hett & Sibbald Ltd.*, [1933] 2 W.W.R. 315 (Sask. C.A.).

<sup>50</sup> Wilson & Wilson, *supra* note 13 at 207-09.

<sup>51</sup> *Ibid.* at 153, 175.

<sup>52</sup> McConnell, *supra* note 5 at 78.

<sup>53</sup> *Ibid.* at 170.

<sup>54</sup> *Ibid.* at 101.

<sup>55</sup> Smith, *supra* note 7 at 73.

<sup>56</sup> *Boyle & Boyle, LP*, vol. 1, file 18.

held on January 3 and 4, 1930 in Humboldt but Diefenbaker and Elder represented him at the trial.<sup>57</sup>

The theory of the prosecution was that Wysochan, thwarted in his attempt to run off with Antena, had forced his way into the home of Antena and her husband, Stanley. Alex was drunk and brandishing a pistol. Stanley managed to escape through a window to summon aid and when the police returned to the house they found Antena mortally wounded and Alex suffering from a minor flesh wound. The theory of the defence was that Stanley had done the shooting, although this was not helped by the fact that, as she was carried from the house, Antena called for her husband and said: “Stanley, help me out because there is a bullet in my body.”<sup>58</sup> The prosecution argued, quite reasonably, that Antena would hardly ask her husband for help, and tell him that she had been shot, if he were the person who had shot her. Another damning piece of evidence came from a witness named Ross Bell who testified that he had seen a revolver in Wysochan’s possession about a week before the murder.<sup>59</sup>

There was evidence from witnesses at the scene that the accused was intoxicated and, at the inquest into Antena Kropa’s death, Dr. H.R. Flemming testified that when Wysochan was taken into custody “he was either in a drunken stupor or semi-unconscious and he wouldn’t talk until the next day”.<sup>60</sup> Diefenbaker marked this passage in the transcript and could have relied upon it to raise the partial defence of drunkenness which might well have resulted in a conviction for manslaughter only. Instead, however, he entered a plea of not guilty and, in the result, Wysochan was convicted of murder and became, on June 20, 1930, the first prisoner to be hanged at the Prince Albert penitentiary. Diefenbaker maintained that his client had instructed him to plead not guilty, although one is left to wonder whether a recently-arrived immigrant who spoke very little English, and who was unfamiliar with the Canadian legal system, could effectively instruct counsel on such a matter.

Diefenbaker further states in his memoirs that “[a] few months after the execution it was established that he was innocent”.<sup>61</sup> Since it is unclear what this evidence was, and nothing about it appears in the file, he is probably simply trying to justify his strategy in the case. He seems, for example, to have expected that Antena’s plea to her husband for help would be excluded as hearsay. It is unlikely that Antena would ask Stanley for help if he had shot her, and equally unlikely that Wysochan would have escaped with only a minor wound if Stanley were the assailant. It is very probable that Wysochan intended to kill Antena and her husband but, when Stanley fled, Wysochan shot Antena and then tried to commit suicide. It has been noted

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<sup>57</sup> For an account of the trial see *The [Saskatoon] Star-Phoenix* (21 March 1930) 1, 7.

<sup>58</sup> *R. v. Wysochan* (1930), 54 C.C.C. 172 (Sask. C.A.).

<sup>59</sup> *LP*, vol. 9, file 181 at 9440.

<sup>60</sup> *LP*, vol. 9, file 180 at 9391.

<sup>61</sup> Diefenbaker, *supra* note 9 at 107.

that Diefenbaker was recovering from a lengthy illness at the time of the trial;<sup>62</sup> perhaps this affected his judgment. Given the circumstances, the credibility of his client, and the fact that a plea of not guilty required his client to take the stand and be subjected to cross-examination, a defence of drunkenness would have been more prudent. Even his partner, William Elder, appears to have become convinced that Wysochan was guilty. In a letter to Diefenbaker dated June 17, 1930, he stated: "...I have somewhat changed my mind in respect to the case. I don't think that we should lose any sleep over the matter whatever."<sup>63</sup> And, interestingly, in the next criminal case he handled in which it was appropriate, *R. v. Harms*,<sup>64</sup> Diefenbaker raised the issue of drunkenness immediately.

John Marcel (Jack) Cuelenaere joined Diefenbaker as an articling student in the spring of 1933. The two were associated in the practice of law for twenty-three years which constituted Diefenbaker's longest professional partnership. Cuelenaere was particularly adept at legal research and case preparation, two areas in which Diefenbaker was not proficient. Cuelenaere was at one time President of the Saskatchewan Young Liberals (a fact which Diefenbaker did not seem to hold against him) and was elected mayor of Prince Albert in November 1945.

It seems likely that Cuelenaere's organizational ability and excellent research skills now allowed the firm to undertake more complex litigation. For example the *Bondholders Securities Corp. v. Manville* cases<sup>65</sup> dragged on for over two years and involved issues such as conflict of laws, the capacity to contract, misrepresentation, and the endorsement of promissory notes. Even the quality of Diefenbaker's criminal work improved. His presentation in *R. v. Bohun*<sup>66</sup> included astute arguments concerning the removal of evidence from a prisoner by the police and the admissibility of statements made by an accused. Although he was ultimately on the losing side, in a case called *Cassidy v. Blaine Lake Rural Telephone Co.*<sup>67</sup> he helped to determine the nature of the employment relationship and the elements necessary for such a relationship to be established for the purposes of (as it then was) *The Workmen's Compensation Act*.

In 1934, just prior to the fall of the J.T.M. Anderson government to the Liberals under James G. Gardiner, Diefenbaker acted briefly as the agent for the Attorney General in Prince Albert; however, his term of office was so short that he did not have the opportunity to prosecute a case. Ultimately this may have worked to his benefit since it would have been difficult for a

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<sup>62</sup> Wilson & Wilson, *supra* note 13 at 114.

<sup>63</sup> *LP*, vol. 9, file 182 at 9552.

<sup>64</sup> *R. v. Harms*, [1936] 3 D.L.R. 497, [1936] 2 W.W.R. 114, 66 C.C.C. 134 (Sask. C.A.).

<sup>65</sup> *Bondholders Securities Corp. v. Manville*, [1933] 4 D.L.R. 699, [1933] 3 W.W.R. 1 (Sask. C.A.); *Bondholders Securities Corp. v. Manville (No. 2)*, [1935] 1 W.W.R. 452 (Sask. C.A.), *aff'd* [1933] 3 W.W.R. 677 (Sask. K.B.).

<sup>66</sup> *R. v. Bohun*, [1933] 3 W.W.R. 146, 60 C.C.C. 114 (Sask. Dist. Ct.); *R. v. Bohun (No. 2)*, [1933] 3 W.W.R. 609 (Sask. K.B.). See also *The [Saskatoon] Star-Phoenix* (22 February 1934) 1. Bohun received a temporary reprieve, but was hanged on March 9, 1934.

<sup>67</sup> *Cassidy v. Blaine Lake Rural Telephone Co.*, [1933] 3 W.W.R. 641 (Sask. C.A.).

former Crown attorney to gain a reputation as a defender of the underdog.<sup>68</sup> While in office the Conservative government had taken the opportunity to reward party loyalists and Diefenbaker was named a King's Counsel in the provincial honours list of January 1, 1930.

Orest Bendas (later a judge) worked as a junior associate with Diefenbaker and Cuelenaere for a year in 1938-39. Russell L. Brownridge, who was appointed to the Saskatchewan Court of Queen's Bench in 1959 and to the Court of Appeal in 1961, articulated with the firm beginning in September 1939. E.N. "Jiggs" Davis had begun his articles with the firm a year earlier but had resigned without completing them and moved to Ontario to become a senior executive for industrialist E.P. Taylor.<sup>69</sup>

The period of 1934 to 1939 was a particularly busy one for Diefenbaker. During that time he handled over a dozen cases that were considered to be important enough to appear in the law reports. In *Hazlett v. Ross*,<sup>70</sup> he successfully argued that when an accused elects to be tried summarily on a charge, and the magistrate finds that the evidence does not establish the offence, but does establish a greater offence, the accused must be informed specifically of the nature of the new charge and of his right to re-elect to be tried summarily before the magistrate has jurisdiction on the new charge. *Camrud v. Hendry*<sup>71</sup> was an affiliation proceeding in which it was held that the gift of a pair of shoes by a putative father to an illegitimate child did not constitute a payment of "money for the maintenance of the child" within the meaning of the limitation section of what was then *The Child Welfare Act*. He represented the accused in an early Native Law case, *R. v. Smith*,<sup>72</sup> which held that the *ejusdem generis* rule should not apply to the phrase "or other purposes" following the words "settlement, mining, lumbering" in the treaty made between the Crown and certain Indians near Carlton on August 23, 1876, and that, therefore, game preserves were not unoccupied Crown lands to which Indians had a right of access within the meaning of paragraph 12 of the Natural Resources Transfer Agreement of 1930.

Some relatively minor cases from this period dealt with matters such as: successfully defending a client charged with the crime of seduction;<sup>73</sup> the definition of the word "willfully";<sup>74</sup>

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<sup>68</sup> "Mr Diefenbaker is a great humanitarian and always very much touched by hardship. He was a great defence lawyer. He was always on the side of the underdog, and he was that way as prime minister, particularly with regard to the prairie people." Howard Green quoted in Stursberg, *supra* note 1 at 217.

<sup>69</sup> Wilson & Wilson, *supra* note 13 at 229, 233; McConnell, *supra* note 5 at 88.

<sup>70</sup> *Hazlett v. Ross*, [1934] 1 W.W.R. 252, 62 C.C.C. 192 (Sask. K.B.).

<sup>71</sup> *Camrud v. Hendry*, [1935] 2 W.W.R. 655 (Sask. K.B.).

<sup>72</sup> *R. v. Smith*, [1935] 3 D.L.R. 703, [1935] 2 W.W.R. 433, 64 C.C.C. 131 (Sask. C.A.).

<sup>73</sup> *R. v. Gasselle*, [1935] 1 D.L.R. 131, [1934] 3 W.W.R. 457 62, 62 C.C.C. 295 (Sask. C.A.).

<sup>74</sup> *R. v. Slusar*, [1936] 1 D.L.R. 96, [1935] 3 W.W.R. 284, 65 C.C.C. 91 (Sask. C.A.).

an action for liquidated damages;<sup>75</sup> proper procedure in sentencing;<sup>76</sup> amending a notice of motion;<sup>77</sup> the extension of the limitation period for an action brought under *The Vehicles Act, 1935*;<sup>78</sup> obtaining money by false pretences;<sup>79</sup> division of the proceeds of insurance contracts;<sup>80</sup> the recovery of a prize awarded by mistake;<sup>81</sup> employer's negligence;<sup>82</sup> interim alimony<sup>83</sup> and, living on the avails of prostitution.<sup>84</sup>

In many ways, *R. v. Harms*<sup>85</sup> represents the pinnacle of Diefenbaker's career as a criminal defence lawyer. At the trial of this murder case he raised, and ably argued, the issues of self-defence, provocation, and drunkenness. His work on the appeal was meticulous and he successfully challenged the trial judge's charge to the jury on several points, using to support his arguments material such as recent House of Lords' decisions and a current article from the *Canadian Bar Review*. In the end, Harms was found guilty of the reduced charge of manslaughter and was sentenced to fifteen years. It has been suggested that Cuelenaere did the research in this appeal;<sup>86</sup> but, whoever in the firm was responsible for the preparation of the case, it was a model of how a criminal defence should be conducted.

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<sup>75</sup> *Gjesdal v. Bergh*, [1935] 3 W.W.R. 296 (Sask. Dist. Ct.).

<sup>76</sup> *R. v. Markoff*, [1937] 1 D.L.R. 77, [1936] 3 W.W.R. 667, 67 C.C.C. 308 (Sask. C.A.).

<sup>77</sup> *Commercial Securities Ltd. v. Bantle* [1938] 1 D.L.R. 776 (case summary only), [1938] 1 W.W.R. 300 (Sask. Dist. Ct.).

<sup>78</sup> *Kwasnica v. Porter*, [1938] 1 W.W.R. 802 (Sask. K.B.), aff'd [1938] 2 D.L.R. 805, [1938] 2 W.W.R. 14 (Sask. C.A.). At trial, Diefenbaker and Emmett Hall appeared on opposite sides in this case; Cuelenaere handled the appeal.

<sup>79</sup> *R. v. Hutchinson*, [1939] 2 D.L.R. 189, [1939] 1 W.W.R. 545, 71 C.C.C. 199 (Sask. C.A.).

<sup>80</sup> *Lefebvre v. Canadian Credit Men's Trust Assn.*, [1938] 2 D.L.R. 687, [1938] 2 W.W.R. 20 (Sask. C.A.). Diefenbaker and Arthur Moxon appeared on opposite sides in this case.

<sup>81</sup> *Prince Albert Agricultural Society v. Dobson*, [1939] 1 W.W.R. 719 (Sask. K.B.).

<sup>82</sup> *Mazurkewich v. Bawkow*, [1939] 4 D.L.R. 222, [1939] 3 W.W.R. 63 (Sask. K.B.), aff'd [1940] 4 D.L.R. 78, [1940] 2 W.W.R. 561 (Sask. C.A.). Cuelenaere handled the appeal.

<sup>83</sup> *Bloom v. Bloom*, [1939] 3 D.L.R. 808 (case summary only), [1939] 2 W.W.R. 533 (Sask. K.B.).

<sup>84</sup> *R. v. Novasad*, [1939] 3 D.L.R. 479, [1939] 2 W.W.R. 293, 72 C.C.C. 21 (Sask. C.A.).

<sup>85</sup> *R. v. Harms*, [1936] 3 D.L.R. 497, [1936] 2 W.W.R. 114, 66 C.C.C. 134 (Sask. C.A.). The case is discussed fully in Wilson & Wilson, *supra* note 13 at 190-206.

<sup>86</sup> Wilson & Wilson, *supra* note 13 at 202-03.

At more or less the same time, Diefenbaker was also involved with a particularly complex civil case. *Hackworth v. Baker*<sup>87</sup> concerned a defendant purchasing and registering an interest in a piece of real estate with knowledge of the pre-existence of an unregistered interest. The issue was whether such an action would constitute fraud under *The Land Titles Act*. This litigation dragged on for several years and occupies five large files in the Diefenbaker archives.<sup>88</sup> Diefenbaker's client was the daughter of the original owner of the property, an 80-year-old illiterate blind woman. There was certainly not a lot of money to be made from this case, and Diefenbaker must have undertaken nearly all the work on a *pro bono* basis. Despite the fact that the statute seemed to state plainly that, barring actual deceit or misrepresentation, notice of an unregistered transfer would not affect a subsequent registered transfer, Diefenbaker lost by only a 3-2 split on the Court of Appeal. In fact, Gordon JA later commented that, almost up to the time that the judgment was handed down, his brother Martin JA agreed with the conclusions of Gordon and Haultain CJS that the actions of the defendant constituted "passive fraud"; but, after reading Turgeon JA's decision, Martin changed his mind and re-wrote his judgment thereby creating a three-judge majority against Diefenbaker.<sup>89</sup>

On April 13, 1938, the well-known writer and naturalist, Grey Owl (who was originally Archibald Stansfeld Belaney of Hastings, England) died. His will had been drafted by A.C. Marsh, K.C., of Prince Albert and, by its terms, one-half of Grey Owl's estate was left to his daughter, Shirley Dawn, who was the issue of his cohabitation with a woman named Anahareo, and one-half to Yvonne Perrier with whom he had gone through a ceremony of marriage at Montreal on December 5, 1936. Marsh and the women in Grey Owl's life were unaware that he had married Angle Aguenta Belaney in Northern Ontario on August 23, 1910. Grey Owl and Angle had three children, although Grey Owl had abandoned his first family in 1925. Upon hearing of his death, Angle applied under *The Widows' Relief Act* for a share of the estate. In the action that followed,<sup>90</sup> Diefenbaker ably represented the interests of Yvonne Perrier and Shirley Dawn and, in the end, the Court quite properly awarded Angle Belaney one-third of her husband's estate.

By the time Diefenbaker appeared for the defence in *R. v. Emele*,<sup>91</sup> he had begun to believe his own publicity. Diefenbaker won an acquittal for his client in February 1940 on a charge of murdering her husband. The Court of Appeal ordered a new trial and he again obtained an acquittal in October 1940. Following the second acquittal, he told an interviewer that Isobel Emele therefore represented his 17<sup>th</sup> and 18<sup>th</sup> clients to be tried for murder. These figures more than doubled the actual total; but the numbers became fixed even in Diefenbaker's

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<sup>87</sup> *Hackworth v. Baker*, [1936] 1 W.W.R. 321 (Sask. C.A.), leave to appeal to P.C. denied [1936] 2 W.W.R. 622 (Sask. C.A.).

<sup>88</sup> *LP*, vol. 3, files 67.1 to 67.5.

<sup>89</sup> McConnell, *supra* note 5 at 193.

<sup>90</sup> *Belaney v. Perrier*, [1940] 1 D.L.R. 105, [1939] 3 W.W.R. 591 (Sask. K.B.).

<sup>91</sup> *R. v. Emele*, [1940] 3 D.L.R. 758, [1940] 2 W.W.R. 430, 74 C.C.C. 76 (Sask. C.A.)



mind and he added to them as other cases came along.<sup>92</sup> (The firm represented Mrs. Emele on one more occasion when John Cuelenaere established her right to a share of her husband's estate because her acquittal on the murder charge was *prima facie* evidence that she had not feloniously caused his death.)<sup>93</sup>

There is evidence that Diefenbaker prepared carefully for his court appearances. For example, he would study and mark relevant passages of testimony taken at preliminary hearings to be used during his cross-examinations at trial.<sup>94</sup> He also made serious attempts to acquire the research materials necessary to keep abreast of the latest developments in the law. Between 1924 and 1939 he purchased, among other items, the *Canadian Encyclopedic Digest* (Ontario and Western editions), *Canadian Criminal Cases*, *Western Weekly Reports*, the statutes of Canada and Saskatchewan, *Halsbury's Laws of England*, *Saskatchewan Law Reports*, *Supreme Court Reports*, *Dominion Law Reports*, and the *English and Empire Digest*.<sup>95</sup> Between 1927 and 1931, he spent over \$500 on law books from Butterworth & Co. alone.<sup>96</sup> On February 7, 1930 he placed an order with Burroughs & Co. of Calgary for a King's Counsel red stuff bag (\$10.00) to hold his new silk robe and a copy of Wrinch's *Cases Judicially Noted* (\$17.50).<sup>97</sup> He purchased *Odger's on Pleading and Practice* in 1934, and *Modern Criminal Investigation* and *Clevenger on Automobiles* in 1936; he began buying the *Canadian Abridgment* but seems to have discontinued the subscription, and he subscribed to the *Fortnightly Law Journal* (published in Toronto) for several years in the mid-1930s.<sup>98</sup> At the time, all of this material would have constituted a first-rate legal research collection for any law firm in the country, let alone a one- or two-man operation in central Saskatchewan.

## V. Ottawa

Diefenbaker was elected to the House of Commons for the riding of Lake Centre on March 26, 1940. He won by 280 votes (of 16,000 cast) over Liberal John F. Johnston.<sup>99</sup> He had previously lost in the federal elections of 1925 and 1926, the provincial elections of 1929 and 1938, and in his attempt to become mayor of Prince Albert in 1933. But Diefenbaker continued to practice law until he became Leader of the Progressive Conservative Party and there are many

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<sup>92</sup> Wilson & Wilson, *supra* note 13 at 259.

<sup>93</sup> *Re Emele*, [1941] 4 D.L.R. 197, [1941] 2 W.W.R. 566 (Sask. K.B.).

<sup>94</sup> See, e.g., *R. v. Williams* (1934), *LP*, vol. 9, file 178.

<sup>95</sup> *LP*, vol. 17, files 597.1, 597.2, 598, 600.

<sup>96</sup> *LP*, vol. 17, file 598 at 15968-69.

<sup>97</sup> *LP*, vol. 17, file 597.2 at 15704.

<sup>98</sup> *Ibid.* at 15823, 15849, 15895; vol. 23, file 664.

<sup>99</sup> Wilson & Wilson, *supra* note 13 at 251-52.

letters in the files between him and his partners in Prince Albert concerning on-going cases, new clients, and office administration.

All during the more than fifteen years that John Diefenbaker spent as a private member of Parliament, he continued the practice of law as best he could. Required to be in Ottawa from fall until early summer, Diefenbaker returned to Prince Albert as often as possible---usually for Christmas and Easter breaks---and carted files back and forth. Travel was by train, and Diefenbaker secured special boxes to accommodate both his legal and political material. To the staff in the law office who packed them, the boxes quickly became the “coffins.” Many files made the round-trip between Prince Albert and Ottawa several times, and some received no attention other than the packing.<sup>100</sup>

Even after his election to Parliament he regularly attended the annual meetings of the Canadian Bar Association and was elected in 1942 to a three-year term as Vice-President.

On February 6, 1940 he made his first appearance before the Supreme Court of Canada representing the respondent in an appeal from a judgment of the Saskatchewan Court of Appeal granting an application for a prerogative writ of *mandamus* to compel the Mining Recorder of Saskatchewan to enter the name of the respondent in the record of mineral claims.<sup>101</sup> His arguments were unsuccessful and it was to be eleven years until his second appearance before the country’s highest court.

He spent a great deal of time in the early 1940s with litigation involving the White Fox Alfalfa Seed Growers Co-operative.<sup>102</sup> The main issue in this case involved the duty of disclosure by an agent, but a great deal of effort was devoted to various interlocutory motions such as the discovery of documents and the striking out of pleadings.

In 1943, Diefenbaker returned to Saskatchewan to conduct two tax cases, an area of law into which he seldom ventured. Both dealt with whether a company is subject to assessment for

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<sup>100</sup> *Ibid.* at 262.

<sup>101</sup> *R. v. Swain*, [1941] S.C.R. 40, [1940] 4 D.L.R. 513, rev’g [1939] 3 D.L.R. 165, [1939] 2 W.W.R. 401 (Sask. C.A.), aff’g [1939] 1 W.W.R. 705 (Sask. K.B.).

<sup>102</sup> *White Fox Alfalfa Seed Growers Co-operative Marketing Association v. A.E. McKenzie Co.*, [1940] 3 W.W.R. 433 (Sask. K.B.); *White Fox Alfalfa Seed Growers Co-operative Marketing Association v. A.E. McKenzie Co. (No. 2)*, [1942] 1 D.L.R. 45, [1941] 3 W.W.R. 919 (Sask. C.A.); *White Fox Alfalfa Seed Growers Co-operative Marketing Association v. A.E. McKenzie Co. (No. 3)*, [1943] 2 W.W.R. 556 (Sask. K.B.); *White Fox Alfalfa Seed Growers Co-operative Marketing Association v. A.E. McKenzie (No. 4)*, [1944] 3 W.W.R. 173 (Sask. K.B.). There was at least one other action in this serial litigation which did not involve Diefenbaker.

municipal business tax with respect to a business conducted on Crown property.<sup>103</sup> Two years later, he helped Cuelenaere defend a client charged with selling a car for a price higher than that set by the Wartime Prices and Trade Board.<sup>104</sup> And, also in 1945, he successfully defended a client charged with failure to answer a “proper question” under the *Excise Act*.<sup>105</sup>

Roy Hall was hired by the Prince Albert firm in 1946 shortly after Diefenbaker’s second election to Parliament and during Cuelenaere’s term as mayor. “[T]he popular quotation around town was that Diefenbaker ran the country, Cuelenaere ran the city and Roy Hall ran the business.”<sup>106</sup> Hall was appointed to the Saskatchewan Court of Appeal in December 1962.

In the autumn of 1948, Diefenbaker returned to Prince Albert to argue a nice point of law in *R. v. Iron*.<sup>107</sup> In this case, the client had been convicted of assault. He spent one month in jail and was then released on bond pending an appeal. The appeal was dismissed and the accused was returned to jail, not on a new warrant of commitment, but on a certificate signed by the deputy clerk of the judicial district. Diefenbaker contended that his client was being illegally detained and applied for his release under a writ of *habeas corpus*. The Court agreed that the certificate was not a substitute for a fresh warrant of commitment and ordered the accused to be discharged from jail.

On May 9, 1951, at Prince George, B.C., Diefenbaker began what was probably his most well-known trial. In *R. v. Atherton (Canoe River Case)*,<sup>108</sup> 22-year-old railroad telegrapher Alfred John Atherton was charged with manslaughter. Railway officials claimed Atherton was negligent in incorrectly relaying a message from the CNR dispatcher in Kamloops which resulted in the wreck of a troop train and the deaths of 21 soldiers and train crew members. Atherton was raised in Saskatoon; his parents still lived there and had enlisted the support of Diefenbaker’s first wife, Edna. Roy Hall did the research and groundwork for the case. Diefenbaker was ultimately able to convince the jury that the incomplete message that caused the head-on collision may have resulted from a short-circuit in the telegraph lines between Kamloops and Red Pass and Atherton was acquitted. Edna Diefenbaker had died while this case was being prepared and Diefenbaker’s hard work on it may well have acted as an anodyne.

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<sup>103</sup> *Prince Albert Air Observers School v. Buckland (Rural Municipality of)*, [1943] 1 W.W.R. 696 (Sask. Assess. Comm.); *Northern Saskatchewan Flying Training School v. Buckland (Rural Municipality of)*, [1943] 1 W.W.R. 710 (Sask. Assess. Comm.); both aff’d [1944] 1 D.L.R. 285, [1943] 3 W.W.R. 609 (Sask. C.A.).

<sup>104</sup> *R. ex rel. Taylor v. Kimbley*, [1945] D.L.R. 413, [1945] 3 W.W.R. 232, 84 C.C.C. 310 (Sask. C.A.).

<sup>105</sup> *R. v. Hicks*, [1945] 1 D.L.R. 796, [1945] 3 W.W.R. 674, 85 C.C.C. 110 (Sask. K.B.), aff’g [1945] 3 W.W.R. 19 (Sask. Pol. Ct.).

<sup>106</sup> E.O. Burt, *Saskatoon Sun* (24 September 1995) 8.

<sup>107</sup> *R. v. Iron*, [1949] 1 W.W.R. 475, 94 C.C.C. 322, 7 C.R. 314 (Sask. K.B.).

<sup>108</sup> The case is unreported. For fuller discussions see Diefenbaker, *supra* note 9 at 111-16, Smith, *supra* note 7 at 185-89, and Wilson & Wilson, *supra* note 13 at 268-76.

The year was a particularly busy one for Diefenbaker since he also made his second appearance before the Supreme Court of Canada. *Lucey v. Catholic Orphanage of Prince Albert*<sup>109</sup> was a relatively simple case involving the question of whether a testatrix had left her estate to an orphanage or to the individual who ran the institution. The trial and first appeal had been handled by Cuelenaere, and it seems likely that Diefenbaker joined in on the final appeal simply because he happened to be in Ottawa at the time. In 1952 he represented a client who had lost the tip of her finger in an accident on a Prince Albert bus<sup>110</sup> and appeared in a case which reiterated the right of either side to demand a civil jury trial in certain specified situations in Saskatchewan.<sup>111</sup> Two years later he appeared before the Supreme Court of Canada for the third time representing the interests of a group of children who, as gratuitous passengers, were seriously injured in a traffic accident through the gross negligence of their driver.<sup>112</sup>

One of the last cases undertaken by Diefenbaker was *M.N.R. v. Davidson Co-operative Association*.<sup>113</sup> This tax case (the third and last of his reported cases on this topic) began in 1953 and dragged on until the early part of 1956. He represented a small-town co-operative that challenged its tax assessment on the basis that it was only acting as an agent for its members, that its profits belonged to the members, and that, since it had no income, it was not liable to taxation. This argument was successful before the Tax Appeal Board, but the Exchequer Court took a different view. The Court held that co-operative was a legal entity distinguishable from its members and that the profits generated by its business were subject to income tax. The case was probably never ultimately winnable but, again, it helped to portray Diefenbaker as someone who would go to great lengths to defend the rights of prairie farmers against the Ottawa bureaucrats.

As early as 1946-47, the House of Commons was already keeping Diefenbaker too busy to deal with cases efficiently.<sup>114</sup> In 1954 he considered joining the Vancouver firm of Jestley, Morrison, Eckardt & Goldie as counsel. He delayed giving them an answer for several months; apparently he was reluctant to join the firm because of his political commitments and because he was concerned that he would not be able to discharge his duties effectively. In a letter to the

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<sup>109</sup> *Lucey v. Orphanage of Prince Albert*, [1951] S.C.R. 690, [1951] 3 D.L.R. 717, rev'g (*sub nom. Re Lucey Estate*) [1950] 2 W.W.R. 1167 (Sask. C.A.), aff'g [1950] 1 W.W.R. 1057 (Sask. K.B.).

<sup>110</sup> *Larsen v. Prince Albert and Northern Bus Lines Ltd.*, [1952] 3 D.L.R. 756, 5 W.W.R. (N.S.) 148 (Sask. C.A.), rev'g (1952), 2 W.W.R. (N.S.) 625 (Sask. Dist. Ct.). Diefenbaker appeared on the appeal only.

<sup>111</sup> *Canadian Forest Products Ltd. v. Saskatchewan Forest Products*, [1952] 4 D.L.R. 654, 7 W.W.R. (N.S.) 187 (Sask. C.A.). Diefenbaker and Cuelenaere appeared here against Roger Carter, future Dean of the College of Law at the University of Saskatchewan.

<sup>112</sup> *Toronto General Trusts Corp. v. Kucher* (1954), [1955] 1 D.L.R. 81 (S.C.C.), rev'g [1952] 3 D.L.R. 114, 5 W.W.R. (N.S.) 241 (Sask. C.A.).

<sup>113</sup> *M.N.R. v. Davidson Co-operative Association*, [1956] Ex. C.R. 138, [1956] C.T.C. 26, 56 D.T.C. 1014, rev'g (1953), 9 Tax A.B.C. 369.

<sup>114</sup> See *D.G. Bawthinheimer, LP*, vol. 15, file 419.

senior partner he stated that “...I have always endeavoured to follow the course of not undertaking anything unless convinced that I will be able to do it at least reasonably well.”<sup>115</sup> Members of his riding association in Prince Albert were divided on whether he should accept the position and negotiations seem to have petered out.

His final appearance before the Supreme Court of Canada came in the appeal of *R. v. Cathro*.<sup>116</sup> He managed to obtain a new trial for his client, who had been convicted of murder, by successfully challenging the trial judge’s rulings in the complicated area of constructive murder and accomplices. Cathro was re-tried in the British Columbia Supreme Court, this time defended by Diefenbaker, in January 1956. He was found guilty of murder and sentenced to death, but the sentence was later commuted. Mr. Justice J.V. Clyne who presided over the second *Cathro* murder trial said that Diefenbaker “was very eloquent before juries and could present a persuasive argument, but in my opinion he was not a very good lawyer.”<sup>117</sup> He did not elaborate on what else, exactly, he expected of a litigator.

Diefenbaker argued one final case in late August 1956---just a few months before he retired from the bar. This, again, was a British Columbia trial that involved the publication of pleadings in a pending libel action and whether this constituted contempt of court.<sup>118</sup>

J.H. Clyne Harradence articulated with the firm and became a partner in 1955. The firm was now known as Diefenbaker, Cuelenaere, Hall & Harradence. Throughout the early and mid-1950s, Diefenbaker was unwilling to stop taking on clients, but he referred virtually every case back to Cuelenaere, Hall or Harradence in Prince Albert. His partners did most of the work, although Diefenbaker believed that it was his name and reputation that attracted many of the clients to the firm. About this time the other partners probably ceased to believe this; each was becoming well known in his own right and having Diefenbaker as a long-distance partner undoubtedly generated more headaches than billings.<sup>119</sup> By 1957, both Cuelenaere and Harradence had resigned from the firm in frustration.

Diefenbaker’s last contemplated legal action occurred in 1965. He had always been sensitive about his German heritage and became very annoyed over a political cartoon in which he was depicted as a Prussian soldier. As he wrote to his brother Elmer: “If you look at the first February issue (15<sup>th</sup>) [actually Feb. 20/65, p. 4] of *Maclean’s* you will find a cartoon about

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<sup>115</sup> Letter to H.L. Jestley (3 June 1954), *LP*, vol. 22, file 659 at 20852.

<sup>116</sup> *R. v. Cathro*, [1956] S.C.R. 101, 2 D.L.R. (2d) 270, 113 C.C.C. 225, 22 C.R. 231, rev’g (1955), 15 W.W.R. 541, 112 C.C.C. 154, 22 C.R. 77 (B.C.C.A.).

<sup>117</sup> J.V. Clyne, *Jack of All Trades: Memories of a Busy Life* (Toronto: McClelland and Stewart, 1985) at 175.

<sup>118</sup> *Sommers v. Sturdy* (1956), 6 D.L.R. (2d) 642, 19 W.W.R. 583, 116 C.C.C. 160 (B.C.S.C.).

<sup>119</sup> See, e.g., *W. Kyle Estate (1954-55)*, *LP*, vol. 5, file 108, and *W.T. Guyer (1955-56)*, *LP*, vol. 6, file 83, where Diefenbaker does nothing about the cases for months on end.

which I am going to sue them for libel. I have been waiting for a really good case and I think I have got one now.”<sup>120</sup> The suit seems never to have been initiated.

## VI. Conclusion

Diefenbaker’s general legal skills may occasionally have left something to be desired; yet he was apparently very effective in front of a jury. This may account for the fact that, while criminal law constituted only a small segment of his practice, he tends to be remembered as a criminal lawyer. He has been described as:

[a] superbly effective defence counsel, [who] excelled in representing accused at a time when appeals to juries tended to be more histrionic than they are now. He had a keen sense of drama and timing, and a shrewd perception of the probable impact of testimony on a jury’s deliberations.<sup>121</sup>

Despite this assessment, however, even with juries he seemed to do well when the trial hinged on facts (as in the *Canoe River* case), but was sometimes less effective when questions of law were involved (*R. v. Wysochan*).

His overall failure<sup>122</sup> as a political leader may have been the result of the habits he acquired early in his career. As a lawyer, he worked alone or as senior partner and was used to making all the decisions. As a young politician, he planned his own campaigns, operated largely by political instinct, and had the single-minded objective of simply getting himself elected, which he finally accomplished after five unsuccessful attempts. Once in power he found himself in unfamiliar situations, particularly in the areas of public administration and foreign affairs. He had problems with delegating and in choosing between difficult options. As has been noted, he seemed “unable to come to a decision on his own as long as his counsellors gave him contradictory advice ... [he] needed others to make up his mind for him.”<sup>123</sup>

Diefenbaker practised law for over thirty-seven years, from July 1919 to December 1956. Most of his career involved civil law and much of the work was mundane (breach of contract,

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<sup>120</sup> T. McIlroy, ed., *Personal Letters of a Public Man: The Family Letters of John G. Diefenbaker* (Toronto: Doubleday Canada, 1985) at 170.

<sup>121</sup> McConnell, *supra* note 5 at 42.

<sup>122</sup> Although Diefenbaker is often viewed as a political failure, it should be remembered that he was responsible for: the *Bill of Rights*; the Gardiner Dam; simultaneous translation in the House of Commons; the initiation of wheat sales to China and the USSR; the Winter Works Programme; calling attention to the potential for the development of the North; appointing the first woman Cabinet minister (Ellen Fairclough); appointing the first Governor-General from Quebec (Georges Vanier); and his pegging of the dollar at 92.5 cents U.S. turned out to be of economic benefit by encouraging Canadian exports. T.C. Douglas even credited Diefenbaker with helping to bring about the national hospitalization plan: see Stursberg, *supra* note 1 at 225-27.

<sup>123</sup> Smith, *supra* note 7 at 487.

divorce, debt collection, and company law). Diefenbaker himself estimates that, by the time he moved to Prince Albert in 1924, ninety-five percent of his practice involved civil law.<sup>124</sup> While his most interesting cases, and the ones that tended to be reported by the press, were criminal, his reputation as one of the country's leading criminal lawyers seems to be largely mythical. There were several other lawyers of the time who had far more successful careers but were, perhaps, not so adept at self-promotion. By way of comparison, Robert A. Bonnar, K.C., a prairie criminal lawyer of the early part of the century, lost only one of the forty-six murder trials in which he acted for the defence.<sup>125</sup>

Many other Canadian political leaders had begun their professional lives as lawyers, but Diefenbaker was perhaps the only one who continued to cultivate his courtroom image. Even after he had given up practice he was still seen in the role of lawyer. A commentator noted: "The election of June 1957 was ideally suited for a person with Diefenbaker's forensic talents. As a superb craftsman in the art of cross-examination, he put the more vulnerable policies of the 22-year Liberal administration in the dock and tore them to shreds."<sup>126</sup>

One of his Ministers recalled that his invitation to join the Cabinet was preceded by a confirming phone call: "The prime minister doesn't ask anybody to do anything unless he knows what the answer's going to be to that request. It's good lawyer's training."<sup>127</sup>

As late as 1976 he was entertaining an audience of 400 people at the Dorchester Hotel in London with reminiscences of his days at the bar. He recalled for them the shortest judgment he had ever heard which was given in response to the plea: "As God is my judge, I am not guilty." The judge had supposedly replied: "He's not. I am. You are."<sup>128</sup>

To the end of his life, Diefenbaker attempted to ensure that he was always viewed as the Man from Prince Albert, the small-town lawyer who fought on the side of the underdog.

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<sup>124</sup> Diefenbaker, *supra* note 9 at 110.

<sup>125</sup> McConnell, *supra* note 5 at 160.

<sup>126</sup> *Ibid.*, at 49.

<sup>127</sup> Frank McGee, MP for York-Scarborough, named Minister without portfolio in 1963. Quoted in P. Stursberg, ed., *Diefenbaker: Leadership Lost, 1962-67* (Toronto: University of Toronto Press, 1976) at 90.

<sup>128</sup> Smith, *supra* note 7 at 569.